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Supreme Court, U.S.
FILED

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF CALIFORNIA

Respondent,

BLUFFORD HAYES, JR.,

Real Party in Interest.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR CALDERON, Warden, and JAMES GOMEZ, Director of the California Department of Corrections,

Petitioners,

v.

U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA (SACRAMENTO),

Respondent,

BLUFFORD HAYES, JR.,

Real Party in Interest.

No. 96-70729

D.C. No. CV-92-~~0963~~ 0603-DFL

OPINION

Petition for Writ of Mandamus
to the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Submitted September 15, 1996*

Filed December 20, 1996

Before: Betty B. Fletcher, John T. Noonan, Jr., and Michael Daly Hawkins, Circuit Judges

By Per Curiam Opinion

*The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P.34(a), Ninth Circuit R. 34-4.

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals denied a petition for a writ of mandamus. The court held that inconsistent application of a state habeas corpus relief timeliness requirement before the conclusion of a defendant's proceedings on direct appeal precludes its use as an adequate and independent state procedural bar to federal habeas corpus relief.

Real Party in Interest Blufford Hayes was convicted of capital murder and sentenced to death. In October 1987, he filed a state habeas corpus petition in the California Supreme Court. In May 1989, the court denied the petition on the merits. In April 1994, Hayes filed a second state habeas petition. On June 21, 1995, the court denied all claims on procedural grounds as untimely, improperly not raised on direct appeal, or previously raised.

In rejecting Hayes' claims as untimely the California Supreme Court relied on *In re Clark*, 855 P.2d 729 (1993), which held that a habeas petitioner must explain and justify any substantial delay in presenting a claim. The court also cited the Supreme Court Policies Regarding Cases Arising from Judgment of Death (Policies), which was published in June 1989.

As to its denial of other of Hayes's claims on the ground that he unjustifiably failed to raise them on direct appeal, the California Supreme Court cited *Ex Parte Dixon*, 264 P.2d (1953) which established the rule, and *In re Harris*, which reaffirmed its validity.

On Hayes' federal habeas corpus petition, petitioners Arthur Calderon, Warden of San Quentin Prison, and James Gomez, Director of the California Department of Corrections,

moved to dismiss 32 of Hayes' claims, citing the procedural bar of the California Supreme Court's June 21, 1995 decision.

The district court denied the motion to dismiss, ruling that before *Clark*, the untimeliness bar was not consistently applied, and therefore could not be used in Hayes' case as an adequate and independent state ground. The court also determined that the *Dixon* bar did not constitute an independent and adequate state procedural bar because it was not consistently applied before *Harris*, which was decided after all proceedings in Hayes' direct appeal had ended. Calderon and Gomez sought a writ of mandamus.

[1] Five factors are considered in determining whether to grant a writ of mandamus: (1) the petitioner has no other adequate appellate remedy; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the district court's order is clearly erroneous as a matter of law; (4) the district court's order is an oft-repeated error; (5) the district court's order raises new and important problems, or issues of law of first impression.

[2] Hayes' first state habeas petition was decided long before *Clark* was decided and the Policies were issued. A state procedural bar must be firmly established and regularly followed by the time as to which it is to be applied. [3] The focus was on the third factor, whether the district court's order was clearly erroneous as a matter of law, which was dispositive.

[4] Because pre-*Clark* requirements were not clear, consistently applied, and well-established, they could not serve as an adequate and independent state ground sufficient to support a procedural default. [5] Only if the state procedural bar is firmly established and regularly followed at the time the claim is raised will it serve to foreclose federal review.

[6] Both the Supreme Court and the Ninth Circuit supported the district court's position that the critical time to

judge Hayes' default was 1987, when he filed his first state habeas petition. The district court's finding was not clearly erroneous.

[7] Whether the *Dixon* rule was sufficiently clear and consistently applied before *Harris* was open to question. Given the lack of consensus on the adequacy of the *Dixon* bar in foreclosing federal review of state-court decisions, it could not be said that the district court clearly erred in determining that it was not consistently applied before *Harris*.

[8] Hayes' direct appeal ended before *Harris* was decided. Hayes had no notice that the *Dixon* bar would be consistently enforced when he had an opportunity to raise the claims on direct appeal, when the alleged default occurred. The district court's conclusion that the *Dixon* bar did not constitute an independent and adequate state bar was not clearly erroneous.

COUNSEL

William G. Prahl, Deputy Attorney General, Sacramento, California, for the petitioners.

No appearance for Real Party in Interest.

OPINION

PER CURIAM:

Arthur Calderon, Warden of the California State Prison at San Quentin, and James Gomez, Director of the California Department of Corrections, (Petitioners) seek a writ of mandamus directing the United States District Court for the Eastern District of California to grant Petitioners' motion for summary dismissal of 32 claims in an action of habeas corpus

brought against Petitioners by Blufford Hayes, Jr. (Hayes), a prisoner at San Quentin prison. In its April 10, 1996 order, the district court denied the Petitioners' motion for summary dismissal of Hayes' claims, holding that although the California Supreme Court held these claims to be procedurally barred, the grounds upon which that court reached its decision were not independent and adequate as applied to state habeas petitions filed before 1993 and federal habeas petitions relating to the same conviction filed after 1993 and therefore did not foreclose federal court consideration of the claims at issue.

[1] Petitioners urge us to direct the district court to vacate its judgment through the issuance of a writ of mandamus, a drastic remedy to be used only in extraordinary cases. *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976). The Ninth Circuit has enunciated five factors to consider in determining whether to grant a writ: 1) the petitioner has no other adequate appellate remedy; 2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; 3) the district court's order is clearly erroneous as a matter of law; 4) the district court's order is an oft-repeated error; 5) the district court's order raises new and important problems, or issues of law of first impression. *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977). Petitioners contend that this case meets all five of the factors. We respectfully disagree.

FACTS

Hayes was convicted of one count of first degree murder with special circumstances of burglary and robbery and was sentenced to death. The special circumstance of robbery was reversed, but the remainder of the conviction and the death sentence were affirmed. *People v. Hayes*, 802 P.2d. 376 (1990).

Hayes filed for a writ of habeas corpus in the California Supreme Court on October 29, 1987; his petition was denied on its merits on May 18, 1989. Hayes filed a petition for a

writ of habeas corpus on June 22, 1993 in the United States District Court for the Eastern District of California. That proceeding was later stayed pending exhaustion of certain of Hayes' claims in state court. On April 22, 1994, Hayes filed a second state habeas petition. On June 21, 1995, the California Supreme Court denied all claims on procedural grounds as untimely, improperly not raised on direct appeal, or previously raised.

Hayes filed an amended petition for a writ of habeas corpus on June 14, 1995 in the United States District Court for the Eastern District of California. On July 18, 1995, Petitioners filed a motion to dismiss 32 of Hayes' claims for relief on the ground that these claims were procedurally barred based on the California Supreme Court's June 21, 1995, ruling. The magistrate judge recommended that Petitioners' motion be denied. The district court adopted the magistrate judge's findings and recommendation and denied Petitioners' motion.

[2] Specifically, the district court determined that in rejecting the majority of Hayes' claims as untimely, the California Supreme Court relied upon *In re Clark*, 855 P.2d 729 (1993). *Clark* held that a petitioner must explain and justify any substantial delay in presenting a claim for habeas relief. The court construed and relied on both existing California practice and "Supreme Court Policies Regarding Cases Arising from Judgment of Death" (Policies), a detailed set of guidelines pertaining to timeliness requirements applicable to state habeas petitioners in capital cases, published in June, 1989. Hayes' first state habeas petition was decided on May 18, 1989, long before *Clark* was decided and before the Policies were issued. The district court held that before *Clark* the untimeliness bar was not consistently applied, so that it could not be applied to Hayes' case as an adequate and independent state ground for decision. A state procedural bar must be "firmly established and regularly followed by the time as to which it is to be applied." *Ford v. Georgia*, 498 U.S. 411, 424 (1991) (internal quotations omitted).

The California Supreme Court denied others of Hayes' claims on the grounds that he unjustifiably failed to raise them on direct appeal, citing *Ex parte Dixon*, 264 P.2d 513 (1953), which established the rule, and *In re Harris*, 855 P.2d 391 (1993), which reaffirmed its continued vitality and narrowed the available exceptions to the rule. The district court held that the *Dixon* bar did not constitute an independent and adequate state procedural bar because it was not consistently applied before *Harris*, which was decided after all proceedings in Hayes' direct appeal had ended.

ANALYSIS

In deciding whether to grant the rare writ of mandamus we have consistently applied the criteria established by *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654-55 (9th Cir. 1977). We have also recognized the possibility of taking into account "other compelling factors relating to the efficient and orderly administration of the district courts." *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1301 (9th Cir. 1982), *aff'd sub nom. Arizona v. U.S. Dist. Ct.*, 459 U.S. 1191 (1983). The burden is on a petitioner seeking a writ to show that his "right to the writ is clear and indisputable." *Executive Software North Am. v. U.S. Dist. Ct.*, 24 F.3d 1545, 1551 (9th Cir. 1994) (internal quotations omitted).

[3] We focus here on the third *Bauman* factor, whether the district court's order is clearly erroneous as a matter of law. *See Executive Software*, 24 F.3d at 1551 ("it is clear that the third factor, the existence of clear error as a matter of law, is dispositive"); *Survival Sys. v. U.S. Dist. Ct.*, 825 F.2d 1416, 1418 (9th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988) ("When the district court's order is correct as a matter of law, it is obvious that the writ of mandamus should not be issued.").

[4] In *Calderon v. U.S. Dist. Ct.*, 96 F.3d 1126 (9th Cir. 1996), we pointed out that the California Supreme Court

acknowledged in *Clark* that "no clear guidelines [regarding departure from the habeas corpus rules] have emerged in our past cases." *Id.* at 1130. Although the State argued in *Calderon*, as it argues here, that California courts regularly and consistently applied the timeliness procedural bar even before *Clark*, this argument was rejected. *Id.* (citing *Morales v. Calderon*, 85 F.3d 1387 (9th Cir.)) (finding no discernible pre-*Clark* timeliness requirements), *cert. denied*, __ U.S. __, 1996 WL 526377 (1996). Because pre-*Clark* requirements were not "clear, consistently applied, and well-established," the court found that they could not serve as an adequate and independent state ground sufficient to support a procedural default. *Id.*

[5] Petitioners argue alternatively that even if the timeliness bar has been applied consistently only since *Clark*, we should apply the bar to Hayes' second state petition, filed after *Clark*. They rely on *Deere v. Calderon*, 890 F. Supp. 893 (C.D. Cal. 1995), which applied the timeliness bar to a second state habeas petition filed after *Clark* where the first state petition was filed before *Clark*. The district court rejected the argument and criticized *Deere* as contrary to Supreme Court and Ninth Circuit authority, holding that in order for a litigant to have a fair opportunity to comply with known procedural rules, the controlling state procedural bar is the one in place at the time the claim should have been raised. Only if the bar is "firmly established and regularly followed" at that time will it serve as an adequate ground to foreclose federal review; otherwise, it will not. *Ford v. Georgia*, 498 U.S. 411, 424 (1991). *See also English v. United States*, 42 F.3d. 473, 478 (9th Cir. 1994); *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994).

[6] The district court found the critical time to judge Hayes' default to be 1987, when he filed his first state habeas petition and failed to raise all of his claims. The state argues that he defaulted on his claims in 1994, when he filed his second state petition. Both Supreme Court and Ninth Circuit precedent

support the district court's position; we conclude it was not clearly erroneous.

The California Supreme Court denied other claims in Hayes' second state habeas petition on the ground that he unjustifiably failed to raise those issues on direct appeal. In doing so, that court cited *Ex parte Dixon*, 264 P.2d 513 (1953), which established the rule, and *In re Harris*, 855 P.2d 391 (1993), which reaffirmed the rule's continued vitality and narrowed the available exceptions to the rule.

[7] The district court held that the *Dixon* bar did not constitute an independent and adequate state procedural bar because it was not consistently applied before *Harris*. Whether the *Dixon* rule was sufficiently clear and consistently applied before *Harris* is open to some question. *Calderon v. U.S. Dist. Ct.*, 93 F.3d at 1131. *Compare Odle v. Calderon*, 884 F. Supp. 1404, 1413 (N.D. Cal. 1995) ("the *Dixon* procedural rule has not been uniformly and regularly applied by the California Supreme Court"), *and Karis v. Vasquez*, 828 F. Supp. 1449, 1467 (E.D. Cal. 1993) (holding that adherence to the *Dixon* rule was purely discretionary before *Harris*), *with Harris*, 855 P.2d at 396 (The *Dixon* "rule is now firmly established and often repeated without much explication."), *and Deere*, 890 F. Supp. at 901. Given the lack of consensus on the adequacy of the *Dixon* bar in foreclosing federal review of state court decisions, we cannot say the district court clearly erred in determining that it was not consistently applied before *Harris*.

[8] Petitioners argue that, even if *Dixon* was not consistently applied before *Harris*, it is fair to apply the *Dixon* bar to Hayes because *Harris* put Hayes on notice that he must justify any failure to raise claims on appeal or lose the ability to raise them on habeas review. We find no merit in the argument. Hayes' direct appeal ended before *Harris* was decided. Hayes had no notice that the *Dixon* bar would be consistently enforced when he had an opportunity to raise the claims on direct appeal, the time at which the alleged default occurred.

The district court's conclusion that the *Dixon* bar did not constitute an independent and adequate state bar to Hayes' federal habeas petition was not clearly erroneous.

Accordingly, the petition is **DENIED.**

APPENDIX B

Supreme Court
FILED
JUN 21, 1995
Robert Wandruff Clerk
/s/ deputy

No. S039415

IN THE SUPREME COURT OF CALIFORNIA

IN BANK

IN RE BLUFFORD HAYES, JR.

ON

HABEAS CORPUS

The petition for writ of habeas corpus, filed in this court on April 22, 1994, is denied. All claims are denied on the merits, except claims 3, 6, and 10. In addition, all claims are denied as untimely, except claims 1, 3, 4, 7, 26.5, 31, 32, 40, 41, 42, and 43. (See in re Clark, (1994) 5 Cal.4th 750, 797; In re Swain (1949) 34 Cal.2d 300, 304.) Claims 3, 7, 26.5, 31, and 32 are denied on the ground that they have previously been raised and rejected, either on direct appeal or by the previous petition for writ of habeas corpus (Crim.25356 - S004421). (In re Harris (1993) 5 Cal.4th 813, 827-829; In re Waltreus (1965) 62 Cal.2d 218; In re Miller (1941) 17 Cal.2d 734, 735.) Claims 6, 8, and 39 are denied on the ground that they could have been, but were not, raised on direct appeal. (In re Dixon (1953) 41 Cal.2d 756.) Claim 27 is denied as duplicative of claim 19.

The Motion to Recall Remittitur, Reinstate Appeal, and Reverse Judgment Pursuant to People v. Fuentes (1991) 54 Cal.3d 707, filed in this court on July 1, 1994, as an adjunct to the petition for writ of habeas corpus, is denied.

Mosk, J. is of the opinion the petition should be denied only on the merits.

/s/

Chief Justice

APPENDIX C

FILED
JAN. 22, 1996
Clerk, U.S. District Court
Eastern District of California
/s/ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BLUFFORD HAYES, JR.,

Petitioner,

vs.

DANIEL VASQUEZ,

Respondent

_____/

No. CIV S-92-0603
DFL GGH P

DEATH PENALTY CASE

FINDINGS AND RECOMMENDATION

Introduction and Summary

Respondent has moved to dismiss 32 claims in the amended petition filed in this case on the grounds that the claims are procedurally barred (defaulted)[1/]. The basis

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1/ These Findings and Recommendations will use the words "bar" and "default" interchangeably.

of two procedural bars claimed are untimeliness, In re Clark, 5 Cal.4th 750, 797, 21 Cal.Rptr.2d 509 (July 29, 1993), and failure to raise claims on direct appeal, In re Dixon, 41 Cal.2d 756, 264 P.2d 513 (1953). For the reasons expressed below, this court recommends that the motion to dismiss be denied on these grounds. Certain other claims were rejected by the state supreme court on account that the claims had previously been raised on direct appeal or in a prior habeas proceeding. In re Harris, 5 Cal.4th 813, 827-829, 21 Cal.Rptr.2d 373 (1993); In re Waltreus, 62 Cal.2d 218, 42 Cal.Rptr. 9 (1965). Of course, this latter bar, while certainly effective to preclude further state review, is not a bar to federal court review of a habeas corpus claim at all.[2/]

2/ One other claim was denied as duplicative. Such a statement by the California Supreme Court is not meant as a procedural bar; it is simply a statement of fact that two claims are indistinguishable from one another. The court will decide whether any federal claims stated are duplicative.

Procedural History

Petitioner was convicted on one count of first degree murder with special circumstances of burglary and robbery; he was sentenced to the death penalty on January 22, 1982. The robbery special circumstance was reversed in People v. Hayes, 52 Cal.3d 577, 276 Cal.Rptr. 874 (December 31, 1990), rehearing denied March 13, 1991, but the remainder of the conviction, including the death sentence, was affirmed. A petition for certiorari was sought on July 11, 1991, but certiorari was denied on November 11, 1991. Acting in propria personam, petitioner filed a request for counsel in this federal court on April 14, 1992, for the purpose of acquiring representation in federal habeas corpus proceedings. After a good bit of difficulty in locating counsel to represent petitioner, counsel was finally appointed on October 27, 1992.[3/] Petitioner thereafter filed his initial

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3/ At one point, this court informed the selection committee for counsel to either have counsel proposed to this court by a date certain, or the court would "involuntarily" appoint counsel. Proposed counsel were proffered just prior

federal petition for habeas corpus on June 22, 1993. On February 4, 1994, federal proceedings were stayed pending exhaustion of claims that had not been presented to the California Supreme Court.

The state petition on exhaustion was filed shortly thereafter (April 22, 1994), and on June 21, 1995, the California Supreme Court denied all claims on the merits except 3, 6, and 10 (as presented in the state petition). The Supreme Court went on to deny all claims as untimely except claims 1, 3, 4, 7, 26.5, 31, 32, 40, 41, 42, and 43. In addition, enumerated claims 6, 8 and 39 were denied as having not been raised on direct appeal, when the claims should have been. Finally, several claims were denied as having been raised once before (3, 7, 26.5 31, and 32). It is not necessary to describe any of the claims at issue in this motion since the various procedural bars imposed by the California Supreme Court do not expressly relate to the

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to the date for involuntary appointment.

substance of any claim. Moreover, since the recommendation herein is to deny respondent's motion in its entirety, and the denial does not relate to the substance of any claim brought, a listing of each claim in the text of these Findings is unnecessary. However, for the sake of completeness, Attachment A to these Findings and Recommendations lists the various state claims at issue in this order and gives their federal counterpart as identified in the amended federal petition.[4/]

1. Legal Standards

Based on concerns of comity and federalism, federal courts will not review federal questions presented by a habeas petition if a prior state court decision denying relief to the petitioner rests on a state procedural rule that is independent of federal law and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct.

4/ The court's list is derived from the list of claims submitted by respondent; the court appreciates counsel's efforts in this regard.

2546 (1991); Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1038 (1989). A federal court faced with an ambiguous state court decision presumes that there is no bar to the federal court's consideration of federal claims; procedural bar will not be applied "unless the last state court rendering a judgment on the case clearly and expressly states that its judgment rests on a state procedural bar." Harris v. Reed, 489 U.S. at 263, 109 S.Ct. at 1043 (citations omitted). Federal questions should be reached only when it "'fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law, that is, in those cases where a federal court has good reason to question whether there is an independent and adequate state ground for that decision.'" Coleman at 735, 111 S.Ct. at 2556.

To be independent of federal law, a state procedural practice must not "depend upon an antecedent determination of federal law." Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992). To be adequate, a state

procedural practice must be "clearly defined," id. at 1462, "firmly established," James v. Kentucky, 466 U.S. 341, 348-51, 104 S.Ct. 1830, 1835-1836 (1984), and "regularly followed," Id. A rule is regularly followed if it is applied in "the vast majority of cases." Dugger v. Adams, 489 U.S. 401, 410 n. 6, 109 S.Ct. 1211, 1217 (1989). The Ninth Circuit has explained the adequate state ground requirement as follows:

> [T]he procedural default is not "adequate" if the state courts themselves bypass the petitioner's default and consider his claims on the merits, if the procedural rule appears to be discretionary, or, ordinarily, if the state fails to assert an interest in compliance with its procedural rules in the petitioner's federal habeas proceedings.

Harmon, 959 F.2d at 1461 (citations omitted).

However, as long as the state court has identified as an alternative ground for denying a claim, an independent and adequate state ground, it is of no dispositive

significance that the state court reached the merits also. Harris v. Reed, 489 U.S. at 264 (n.10), 109 S.Ct. at 1044.

If the state court decision is supported by an independent and adequate state ground, the federal court may still consider the claim if the petitioner demonstrates: (1) cause for the default and actual prejudice resulting from the alleged violation of federal law, or (2) a fundamental miscarriage of justice. Harris, 489 U.S. at 262, 109 S.Ct. 15 1043 (citing Murray v. Carrier, 477 U.S. 478, 485, 495, 106 S.Ct. 2639, 2644 (1986)). "'[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" McCleskey v. Zant, 499 U.S. 467, 493-94, 111 S.Ct. 1454, 1469-1470 (1991) (quoting Murray, 477 U.S. at 488). Examples of cause include showings "that the factual or legal basis for a claim was not reasonably available to counsel," "that some interference by officials

made compliance impracticable," or "of ineffective assistance of counsel." Murray, 477 U.S. at 488, 106 S.Ct. at 2645. The Court has limited the "fundamental miscarriage of justice" exception to those who can show actual innocence, id. at 490; Noltie v. Peterson, 9 F.3d 802, 806 (9th Cir. 1993), including actual innocence of the death penalty, Smith v. Murray, 477 U.S. 527, 537-38, 106 S.Ct. 2661 (1986); Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514 (1992).

2. Untimeliness

In this case, citing In re Clark, supra, the California Supreme Court denied many claims on the grounds that they were untimely brought. However, because the final state decision on direct appeal and initial habeas review were filed before Clark was issued, the issue initially presented in determining whether Clark may be applied is not whether Clark itself stands as a precedent forbidding the filing of untimely petitions, but whether Clark was a

pronouncement of a new rule to this effect, or whether Clark was merely reaffirming a longstanding practice.

In general, respondent claims that Clark is applicable for two reasons:

1. Clark reaffirmed a longstanding California rule barring the filing of untimely petitions;

2. In any event, Clark applies because the state petition on exhaustion was not filed until after Clark was issued.

For reasons given below, the first point, although arguable, is ultimately flawed due to binding precedent and inconsistencies in the Clark opinion itself. The second point is not meritorious due to the fact that the consistency for which a procedural bar has been applied, i.e., the validity of the procedural bar, is measured from the time a petitioner's default is first present, not at the time petitioner ultimately files his "defaulted" claims.

The Ninth Circuit, in an opinion that is difficult to decipher in terms of the precise procedural bars being addressed, held:

> The California Supreme Court has recently held that the procedural bars the state relied upon are discretionary, and have not been applied consistently. [citing In re Clark]

Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994).

Nowhere in the entire opinion did the Ninth Circuit specify precisely what procedural bars the state had expressly relied upon in its brief, and the order of the California Supreme Court was completely non-explanatory in this respect. One is left to divining what procedural bars the Ninth Circuit perceived as having been raised by the state in its briefs (and ruled upon by the California Supreme Court) in its later discussion of "subsequent," "successive" and "piecemeal" petitions. Siripongs held that its piecemeal petition was not procedurally barred. Clark itself discussed piecemeal, successive and delayed (untimely) petitions. However, even

respondent in this case concedes that the state supreme court itself was attempting to clear up inconsistencies of procedural bar application: "Our past decisions have thereby suggested that the rules against piecemeal presentation of claims and repetitious [successive] petitions are subject to undefined exceptions and that the court may be willing to entertain multiple collateral attacks on a judgment notwithstanding the potential for abusive writ practice." In re Clark, 5 Cal.4th at 768, 21 Cal.Rptr.2d at 520.

Respondent notes, however, that Clark made a different statement for its delay (untimeliness) rules——and respondent is correct. "Our decisions have consistently required that a petitioner explain and justify any substantial delay in presenting a claim." In re Clark, 5 Cal.4th at 783, 21 Cal.Rptr.2d at 530. The problem with respondent's (and Clark's) pronouncements is that in the circumstances of this case, and Siripongs as well, there is absolutely no meaningful distinction between claims brought

in a "piecemeal" fashion and claims brought with undue "delay"——a claim brought in a piecemeal fashion is a delayed claim and vice versa.[5/]

Therefore, because the factual setting of Siripongs and the present case match in terms of when the new claims were presented to the California Supreme Court, this court believes that the result in Siripongs of not applying the procedural bar because of alleged piecemeal presentation of claims must be matched here. There can be no doubt that the claims in Siripongs, like the claims here, were substantially delayed as present standards would measure the delay. Respondent must attempt to have Siripongs overturned before this court could consider the matter

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5/ The court notes the absurdly remote possibility that a claim could be brought in a piecemeal fashion, but within the relatively short time-frame for a timely claim, i.e., petitioner would be filing new claims within days of one another. However, that remote possibility is not at issue in this case or the vast majority of cases where new claims have been brought long after the initial state proceedings are terminated.

further. See also, Karis v. Vasquez, 828 F.Supp. 1449, 1462-1464 (E.D.Ca. 1993).

The court is not stating that petitioner had a "right" under older California law to file a delayed or piecemeal petition. But the issue to be resolved here is different from that just posited. That issue, again, is whether the procedural bar of delayed or piecemeal petitions was consistently applied. The Ninth Circuit has held that it was not. However, the court expresses no opinion herein concerning the validity of a Clark procedural bar for convictions which were final subsequent to Clark.

Respondent's second point, which assumes the present validity of Clark, is that even if Clark is not retroactively applied, the petition on exhaustion in this case was filed subsequent to Clark; hence, petitioner's new claims presented in that petition are governed by the Clark rule. However, respondent's point is contrary to established

precedent concerning the time at which one measures the validity of a procedural bar.

A litigant must have a fair opportunity to comply with known procedural rules. In order to provide this fair opportunity, the state procedural bar at issue is the one in place at the time the claim should have been raised. Ford v. Georgia, 498 U.S. 411, 424, 111 S.Ct. 850, 857 (1991). In Ford, the state supreme court had established a new procedural rule governing the timely assertion of a Batson claim. The state court then retroactively applied the new rule to bar the petitioner's Batson claim. The Supreme Court found that since the rule was not firmly established at the time the petitioner should have raised the claim, it was inadequate to bar federal review. 498 U.S. at 424-25, 111 S.Ct. at 857-858. This circuit, citing Ford, has acknowledged that the applicable procedural bar to consider is the one in effect "at the time of the petitioner's purported

default." Wells v. Maass, 28 F.3d 1005, 1010 (9th Cir. 1994).[6/] [7/]

6/ Deere v. Calderon, 890 F.Supp. 893 (C.D. Cal. 1995) briefly addresses the application of Clark to a procedural default which took place prior to the Clark opinion. In Deere, petitioner filed a first petition prior to Clark and a second petition after Clark. The second petition had been denied as untimely by the California Supreme Court, citing Clark. The Deere court found that the California Supreme Court had consistently applied the Clark standards to the nine habeas petitions filed after Clark. The Deere court thus concluded that Clark's timeliness rule was adequate to bar federal review. In reaching that conclusion, the court only briefly addressed the retroactivity issue:

> It is not unfair or unjust to now honor the procedural bar in the face of the previous ruling of inconsistency in California. Clark did not change the requirements for filing state habeas petitions in California. Clark merely put petitioners on notice that previously established standards would be followed.

890 F.Supp. at 900. (continued)

In summarily determining that retroactivity was not a problem, the district court in Deere failed to examine the retroactivity issue as applied to the law of procedural default. In this respect, Deere is contrary to Supreme Court and Ninth Circuit authority. To the extent

Therefore, the claims procedurally denied by the California Supreme Court on the basis of delay (untimeliness) are not barred from review by this court.[8/]

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that Deere holds that Clark does not announce a new rule, this court believes the Deere holding to be inconsistent with Siripongs.

7/ The court proposes no holding on the post-Clark situation where a petitioner unduly delays filing his state petition on exhaustion after his initial federal petition has been stayed. In such a case a theory of "continuing default" might apply.

8/ The court need not discuss at length petitioner's alternative contention that the procedural bar rulings of the California Supreme Court herein were not independent of federal law. Suffice it to say here that the court disagrees with petitioner. Alternative holdings on the merits and state procedure which are clearly differentiated as such do not preclude imposition of procedural bar. Harris v. Reed, supra. Moreover, simply because a state's procedural rule contains some limited exceptions (such as fundamental miscarriage of justice), whose scope is clearly defined, does not mean that the bar is interwoven with federal law or subject to discretionary application. The exception in a state's procedural rule set forth in McKenna v. McDaniel, 65 F.3d 1483 (9th Cir 1995)——"plain error or issues of constitutional dimension" is so broad as to encompass all of federal habeas review issues. The McKenna court was not discussing a limited exception.

The court further disagrees with petitioner that the California Supreme Court did not clearly state its reliance on procedural bar, or that the state supreme court

3. Claims Previously Timely Raised On Direct Appeal Or Initial State Habeas Corpus, But Which Were Raised Again In The Petition On Exhaustion Are Obviously Not Barred From Review In Federal Court

Respondent's theory——that the California Supreme Court's ruling that it would not review claims it had already reviewed states a procedural bar to federal habeas review——ignores controlling authority. Obviously, for its own purposes, the state supreme court is entitled to rule that it will not review the same claim again. However, if that claim has never been ruled upon in federal habeas review, the asserted bar that the claim has been "exhausted too much" has nothing to do with the independent and adequate state ground rationale for the preclusion of federal review. This court agrees with petitioner's argument:

> A denial [by the state supreme court] based upon previously raising a claim is not a procedural default. Ylst v. Nunnemaker, 501 U.S. 797 (1991) (A reference to In re Waltreus, 62 Cal.2d 218.... merely stands for

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did not have the power to declare procedural bars (a state law issue).

> the proposition that an 'ordinary state rule barring relitigation of claims raised on direct appeal" has "no bearing upon [petitioner's] ability to raise [the] claim in federal court." Id. at 806). See also, Maxwell v. Sumner, 673 F.2d 1031, 1034-35 (9th Cir. 1982).

Petitioner's Opposition at 21.

In the future, respondent should refrain from making the argument made herein. There is no basis in controlling law for the argument.

4. The Dixon/Harris Bar Does Not Preclude Federal Review——At Least For Cases In Which The Termination of the Direct Appeal Occurred Prior To The Harris Ruling

The California Supreme Court's rule precluding consideration in a petition for habeas corpus of a claim which could have been, but was not raised on appeal, has been known as the Dixon rule. See In re Dixon, 41 Cal.2d 756, 759, 264 P.2d 513 (1953). In re Harris, cited by the California Supreme Court herein in denying petitioner's state habeas petition along with Dixon, announced the court's intention to apply the Dixon rule

consistently in the future. Harris also expressed a longstanding adherence of California courts to the Dixon rule. However, as previously discussed, the procedural practice applicable to petitioner in this instance would be the one in existence at the time of his direct appeal. At the time of the ruling on petitioner's direct appeal, the Dixon rule was not adequate to preclude federal court consideration of a claim because it was not in fact consistently applied by the California Supreme Court. Odle v. Calderon, 884 F.Supp. 1404, 1413 (N.D. Cal. 1995); Karis, 828 F.Supp. at 1467.

Karis cited several California cases that held the adherence to the Dixon rule (referenced as the Terry rule in Karis) was purely discretionary. See, In re Wallace, 3 Cal.3d 289, 292, 90 Cal.Rptr. 176, 178 (1970): "But the '"'requirement of exhaustion of the appellate or other remedy ... is merely a discretionary policy governing the exercise of the reviewing court's jurisdiction to issue the writ.'"'" For example, the cases indicate that the

California courts will not apply their procedural "failure to appeal" rule whenever failure to review the sufficiency of the evidence would violate due process. In re Giannini, 69 Cal.2d 563, 577 (n.11) (1968), disapproved on other grounds Crownover v. Musick, 9 Cal.3d 405, 430 (1973).[9/] In expressing a longstanding adherence to the Dixon rule, the state supreme court did not cite to its contrary authority. However, in this court's canvassing of the California cases, such authority may not be ignored.

Conclusion

IT IS HEREBY RECOMMENDED that the motion to dismiss all claims referenced by the California Supreme Court as procedurally barred should be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the

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9/ Crownover itself was overruled in Morris v. Municipal Court, 32 Cal.3d 553 (1982) on grounds not pertinent here.

case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within **twenty (20)** days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten (10) days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

DATED: January ____, 1996.

_____
GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

GGH:gh:dn
hayes.fr

(Attachments not included)

APPENDIX D

FILED
APR 10, 1996
Clerk, U.S. District Court
Eastern District of California
/s/ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BLUFFORD HAYES, JR.,

Petitioner, No. CIV S-92-0603
DFL GGH

v.

ARTHUR CALDERON, et al.,

Respondents DEATH PENALTY CASE

ORDER

_____/

On January 22, 1996, the magistrate judge filed findings and recommendations addressing respondents' motion to dismiss. This matter was previously referred to the magistrate judge under 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262. The magistrate judge recommended that the motion be denied.

Respondents then filed objections and petitioner has responded to the objections. I have reviewed the objections and the motion. I find that the motion should be denied for the reasons stated in the findings and recommendation which I now adopt.[1/]

The motion to dismiss is DENIED.

DATED: 9 April 1996

UNITED STATES DISTRICT COURT
/s/

1. At page 12 of the findings and recommendations there is dicta that may be read to suggest that a citation to In re Waltreus, 62 Cal. 2d 218 (1965), guarantees that the claims at issue may be considered on their merits in federal habeas corpus. The import of this statement is accurate in the context of this case but over broad. See Forrest v. Vasquez, 75 F.3d 562 (9th Cir. 1996).